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15-2805 (Con)

United States Court of Appeals for the Second Circuit

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

AND

NATIONAL FOOTBALL LEAGUE, DEFENDANT-APPELLANT

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF TOM BRADY,
DEFENDANT-COUNTER-CLAIMANT-APPELLEE

AND

TOM BRADY, COUNTER-CLAIMANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982

BRIEF OF KENNETH R. FEINBERG AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

[*cover continued on next page*]

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Kenneth R. Feinberg has over 35 years of alternative dispute resolution experience, including as special master of the September 11th Victim Compensation Fund. He is an experienced arbitrator and leader within the dispute resolution community. *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 688 & n.1 (2010) (Ginsburg, J., dissenting). His high-profile arbitrations include valuing the Zapruder film and Holocaust Slave Labor attorneys' fees, among many others.

Mr. Feinberg has a strong interest in this case because it raises fundamental questions bearing on the legitimacy of arbitration as a means of alternative dispute resolution, including: the notice and opportunity to respond that must be afforded to parties, arbitrators' power to disregard contractual language and past practice, and arbitrators' ability to advance partisan interests. All parties have consented to the filing of this amicus brief.[1]

SUMMARY

Mr. Feinberg comes before this court not to support the unfettered aggrandizement of arbitral powers for he and his fellow arbitrators—but to caution

[1] No party's counsel authored this brief in whole or in part. No party, no counsel for any party, and no person other than *amicus curiae* or its counsel contributed money that was intended to fund preparation or submission of this brief.

against it. If the restrictions on arbitrators acting outside the scope of their authority, imposing their own industrial justice, or acting with bias are weakened so greatly as to permit the enforcement of the Commissioner's award, it will fundamentally erode the public's trust and confidence in arbitration.

ARGUMENT

I. Procedural Integrity Is Inherent To The Viability Of Arbitration.

As the neutral charged with many of the nation's most high-profile resolution programs, including the September 11 fund, Mr. Feinberg acutely understands the real-world importance of fairness to the parties' ability to accept an outcome—whatever it may be. Often no sum of money can repair the losses victims and their families suffer. "Justice" rests solely upon receiving fair process.

These same principles resound equally in arbitration. In Mr. Feinberg's personal experience over the past 35 years, the key to a successful arbitration begins with a clear understanding by the parties of the scope of the arbitration itself and the role the arbitrator plays in assuring fairness and due process. This is all the more important where there is a sole arbitrator. Mr. Feinberg has been involved in many high-profile arbitrations—Stolt-Nielsen, the Kennedy assassination film valuation, and the determination of Holocaust Slave Labor Attorneys' fees, among others. In these cases, scrupulous adherence to procedural due process was critical to the credibility and success of the arbitrations.

In contrast, the Commissioner's decision here lacked even the basic hallmarks of due process—a fair process, before a fair tribunal. Decisions such as this have no credibility. That lack of credibility is only heightened here, where the non-neutral arbitrator's key decisions consistently advantaged his own organization over the opposing party.

Until now, contracting parties have been assured that the court will ensure a baseline level of process: an opportunity to present evidence to an unbiased tribunal. *See* 9 U.S.C. § 10(a). The panel's decision functionally eviscerates these protections. If it is permitted to stand, parties will and should question the risk posed by arbitration. Having witnessed the tremendous benefits arbitration and private dispute resolution have shown in myriad types of conflict, this would be a tremendous loss to our justice system. While arbitrators' approaches may vary, the Commissioner's actions were simply beyond the bounds. They must be recognized as such to preserve the public's faith in the arbitration process.

II. The Commissioner's Procedural And Substantive Determinations Were Arbitrary, Biased, And Beyond The Parties' Grant Of Authority.

The selection of a non-neutral arbitrator does not vitiate the requirement that the arbitrator act impartially and in a manner consistent with the collective desires of both parties. Notwithstanding that directive, the Commissioner impermissibly exceeded the scope of his authority, then created new substantive and procedural rights not contemplated by the CBA, to effectuate his "own brand of industrial

justice." *Stolt-Nielsen*, 559 U.S. at 671 (citation omitted). He reshaped the parties' bargain to favor the NFL. This violates the most basic tenet of arbitration: the arbitrator's authority is derivative of and subordinate to the contract. *See id*. at 683-84; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

1. Scope of Proceeding. Arbitrators must ensure that the parties are fully aware at the outset of the scope of the arbitration and what factors will be deemed important in rendering a decision. Arbitrators must not change issues or render decisions inconsistent with the parties' understanding at the outset. This is prerequisite to allowing the parties to develop—and, in turn, present—pertinent evidence. *See* 9 U.S.C. § 10(a) (authorizing vacatur for "refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced").

The Commissioner's award violated all these principles. The disagreement within the panel itself speaks volumes about the lack of clear notice to the parties about the scope of the appeal. *See* Slip op. at 21. This dynamic made it impossible for Brady to obtain fair process. The award sent a clear signal to the public about arbitration: procedural due process can be ignored. In so doing, he undercut the role of arbitration as a viable and effective alternative to protracted litigation.

2. Ultra Vires or Biased Decisions Are Unenforceable. Honest mistakes (whether errors of law or fact) are not reviewable. In contrast, unfair rulings and

bias are intolerable. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Arbitrators must be perceived as neutral and must not suffer from a conflict of interest. *See* 9 U.S.C. § 10(a) (providing vacatur for "partiality" or "undue means"). Even if the parties convey wide-ranging discretion, this does not excuse unfettered discretion.

Ordinarily in the labor context, shifting rationales raise an inference of bias. *See EEOC v. Ethan Allen*, 44 F.3d 116, 120 (2d Cir. 1994). Here, the shift is simply one striking example of the biased process. *Cf.* Slip op. at 3-4 (dissent).

First, an award that creates new violations never before identified or exacted punishment far in excess of that previously prescribed, is unenforceable. *See In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 93-96 (2d Cir. 1988). It is undisputed that the award here did both.

If the NFL sought to add a new violation for failure to report wrongdoing, increase the penalty for equipment violations, or begin suspending players for obstruction, it would be within its rights to do so. But these changes must come through the bargaining process—not the arbitration process. The arbitrator, whose authority is derivative of the contract, cannot modify the contract. *Alexander*, 415 U.S. at 53; *Stolt-Nielsen*, 559 U.S. at 683-84.

The panel opinion suggests that if a party is unhappy with the result of an arbitration, the remedy is to circumscribe the arbitrator's authority. Slip op. at 13.

The Association did just that by clearly specifying equipment penalties. (*See* JA 384.) The arbitrator exceeded this specification, relying on his general powers to take action exceeding the limited grant of authority with respect to equipment violations. (*See* SPA 55-57.) If this is permitted to stand, the sole remedy of contractual specification the panel identifies will be rendered meaningless.

Second, the rulings are also internally inconsistent. The Commissioner was confronted with two issues on appeal—scope of review and scope of discovery. As to the first issue, he determined he could consider alternative bases and was not confined to the original decision. (*See* SPA 48-49.) On the second issue, Brady was confined to the materials reviewed in making the original decision—even though the Commissioner ruled that the appeal was not so confined. (*See* SPA 64-66.)

Assuming arguendo that this construction of the scope of the appeal was valid, it was unreasonable to fail to provide (1) any notice of what these new grounds may be, and (2) discovery related to these potential new grounds. These rulings deprived Brady of any prospect of a fair hearing. *See* 9 U.S.C. § 10(a).

3. Selection of a Non-Neutral Does Not Waive Right to a Fair Arbitration.

It is relatively common for parties to select a non-neutral arbitrator, but this does not vitiate the arbitrator's obligation to act without bias. *Enter. Wheel*, 363 U.S. at 597. The Commissioner used the guise of arbitration to dramatically alter many of the long-standing features of the parties' course of dealing. Substantively, he

created new violations and disciplinary powers. These were objectives for the bargaining table, not to be unilaterally imposed by a biased arbitrator in the arbitration itself.

So too the procedures the Commissioner utilized were not an exercise in arbitral discretion, but instead so one-sided as to reflect a clear intent to advantage one side. He appointed his own in-house counsel as co-lead investigator, then ruled that individuals that did not cooperate with or obstructed his investigation could be sanctioned. (*See* JA 1198.) Indeed, Brady's refusal to cooperate was cited as a major factor in the four-game suspension. (*See* SPA 52-54.) Although the NFL had full access to the results of the investigation, Brady's team was denied access to the materials. (*See* SPA 64-66.) In sum, Commissioner Goodell utilized his purported procedural authority to grant unilateral discovery to one side (accompanied by a threat of sanction), while affirmatively denying the other side's request to the same materials.[2] The notion that only one side would be entitled to the materials of the independent investigator is so egregious that it cannot be the result of good faith mistake—there is no provision in the CBA that could be

[2] The Commissioner attempts to justify his ruling by classifying these materials as an independent assessment within the arbitral process. (*See* SPA 65.) This compounds the error. Once he decided to appoint his own counsel to the investigation, thereby granting one party access, he was obliged to give equal access to opposing parties.

construed to even contemplate this type of one-sided access. It is instead yet another clear indicia of the bias that permeated this proceeding.

CONCLUSION

The Commissioner impermissibly exceeded the scope of his authority in this matter. But more troubling, he used the vehicle of arbitration as a mechanism to rewrite the underlying bargain between the parties, to the sole advantage of his organization as against Brady and the Players Association. If this type of bias or capricious notions of industrial justice are upheld, the public should—and will—lose faith in the systems of arbitration and private dispute resolution that have become a parallel component of our justice system.

Fair process before a fair tribunal cannot be an aspiration; it is an unwaivable, inviolable necessity.

Respectfully submitted,

/s/ Anthony S. Barkow

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May 31, 2016

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE STYLE REQUIREMENTS

I hereby certify that this *amicus* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. In addition, this brief complies with the limitation on length set by Federal Rule of Appellate Procedure 29(d) and 35(b)(2).

Dated: May 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of May, 2016, I caused the foregoing *amicus* brief to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit via the Court's CM/ECF system. I further certify that service was accomplished on all parties via electronic filing or first class mail.

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